In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 70-153

UNITED STATES OF AMERICA, *Petitioner*

vs.

UNITED STATES DISTRICT COURT, *Respondent*

BRIEF OF BLACK PANTHER PARTY, NATIONAL LAWYERS GUILD AND NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICI CURIAE ON BEHALF OF RESPONDENT

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PERNAU-WALSH PRINTING CO. SAN FRANCISCO, CALIFORNIA

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THE INTEREST OF AMICI CURIAE

Black Panther Party, National Lawyers Guild and National Conference of Black Lawyers are organizations that have been concerned with the development of the law of political and civil rights in the United States for from three to forty years. The organizations, their members and their attorneys have exhibited a tireless concern for the maintenance of constitutional liberty, primarily in the interest of minorities and oppressed individuals in the society. The instant case raises important constitutional issues concerning the rights of groups and individuals to be

free from warrantless electronic eavesdropping. It is a case of great interest to all those concerned with the protection of liberty in this country, but especially so for those who, like each amicus curiae, represent large numbers of the poor, the non-white, and the politically active.

Counsel for the parties have consented to the filing of the attached brief amici curiae and leave is accordingly respectfully sought to file it.

ARGUMENT

I. THE POWER ASSERTED FOR THE EXECUTIVE IS JUDICIAL AND THEREFORE VIOLATES THE FUNDAMENTAL CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS.

Black Panther Party, National Lawyers Guild and National Conference of Black Lawyers as amici curiae respectfully urge the Court to uphold the powerful constitutional positions of the courts below. The contention of the Executive Department[1] must be sternly rejected. The Attorney General seeks to abrogate the fundamental constitutional principle of the separation of powers.

The Attorney General has variously stated the position of his department in the several cases around the circuits testing the power of the President to engage in wiretapping without a warrant. In his brief

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[1] It would be misleading to refer to the petitioner as the Government, or as the United States, however common the practice, in the context of the issues of this case. The petitioner is but one of the separate and independent arms of the Government, or of the United States, to wit, the Executive.

in *United States v. Hilliard,* pending in the Ninth Circuit (No. 71-2097), in which the issue is precisely the same as the issue here, he says:

> "The issue presented to this court for decision is whether the President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance to protect the United States against the overthrow of the Government by force or other unlawful means or any other clear and present danger to the structure or existence of the Government."

The Executive Department argues that the President can do it. The Constitution says he cannot.

The Fourth Amendment places the power to decide when there shall be a search and seizure, not in the Executive Department, but in the Judicial Department (*Johnson v. United States,* 333 U.S. 10, 68 S.Ct. 367 [1948]).[2] Thus, by the familiar rule of exclusion, applied to a government of delegated powers only,[3] it is plain that the Constitution denies to the Executive the power it asserts the right to exercise in this case. (*Muskrat v. United States,* 219 U.S. 346, 31 S.Ct. 250 [1911].)

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[2]Amici curiae do not understand the Attorney General to challenge this Court's holding in *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507 (1967), that wiretapping is a form of search and seizure, subject to the requirements of the Fourth Amendment.

[3]That the

> "powers . . . [of each department] shall be forever separate and distinct from each other . . . is implicit. See Kilbourn v. Thompson, 103 U.S. 168, 190, 191, 26 L.Ed. 377 . . . .
>
> "And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism." *Springer v. Government of Philippine Islands,* 277 U.S. 189, 48 S.Ct. 480 (1928).

Nor was the denial of the power asserted, when the Constitution was drafted, accidental.

The Framers of the Constitution deliberately and expressly undertook to implement the philosophy of government of Charles Louis de Secondat, Baron de la Brede et de Montesquieu.

To Montesquieu, and to Madison and Hamilton following him, the principle of the separation of powers was the "sacred maxim of free government" (The Federalist Papers, No. 47; see Dietze, *The Federalist,* p. 126 [Johns Hopkins Press, 1960]). To Madison, "[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny" (*ops.cit.*).

And it was precisely to block tyranny that the Constitution separates the powers of government into interdependent, but independent, compartments. "'Separation of powers' . . . was looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose his unchecked will." (*United States v. Brown,* 381 U.S. 442, 443, 85 S.Ct. 1707 [1965].)

The distribution of powers to three interdependent branches of government accomplished a system of checks and balances, "established in order that this should be a 'government of laws and not of men.'"

(Brandeis, J., dissenting in *Myers v. United States*, 272 U.S. 52, 47 S.Ct. 21 [1926].)

Understandably, efficiency in the administration of government was consciously sacrificed in favor of the exalted purpose of the doctrine. The principle was "not instituted with the idea that it would promote governmental efficiency" (*United States v. Brown, supra*), but "to save the people from autocracy" (Brandeis, J., *supra*).

Notwithstanding the materials defining the significance and applicability of the doctrine of separation of powers are "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh" (Jackson, J., concurring in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863 [1952]), this Court has considered the matter sufficiently to establish with blazing clarity that the Constitution denies to the President the power the Attorney General claims he has.

Youngstown Sheet and Tube, supra, the steel plant seizure case, is definitive and controlling. In that case, as here, the President claimed the right to exercise a power assigned by the Constitution to a different department. In those circumstances, Mr. Justice Jackson's concurring opinion explained, the test of the President's power finds that "his power is at its lowest ebb, for then he can rely only upon his own constitutional powers, minus any constitutional powers" of another department over the matter. Mr. Justice Jackson's caveat is accordingly explicitly applicable to the instant case:

> "Presidential claim to a power at once so conclusive and preclusive [because if the President can exercise the power, no other department can] must be scrutinized with caution, for what is at stake is the equilibrium established by our Constitutional system."

The impact of the doctrine falls equally upon all departments, whenever any one assumes a power assigned to another, or when one department purports to acknowledge a nonexistent power in one of the others. See, for example, *United States v. Brown, supra,* for restrictions on the legislative department; *Meriwether v. Garrett,* 102 U.S. 472, 26 L.Ed. 197 (1880), and *Muskrat v. United States, supra,* for restrictions on the judicial department; and *Youngstown, supra,* for restraint upon the executive department.

In all these illustrations, no principle is more basic than that stated in *Lichter v. United States,* 334 U.S. 742, 68 S.Ct. 1294 (1948):

> "In peace or in war, it is essential that the Constitution be scrupulously obeyed, and particularly that the respective branches of the government keep within the powers assigned to each by the Constitution."

But the Attorney General argues here for recognition of a power in the Executive that would destroy the equilibrium, shatter the principle of separate powers that is the bulwark against tyranny. Plainly, if any one department of government may, unchecked by another department, first determine the existence

of, then act to meet an emergency so grave as to threaten "the structure or the existence of the government," then distribution of the powers of that government among three independent branches is brought to an inglorious end.

Mr. Justice Jackson, himself an Attorney General before he joined this Court, understandably foresaw future claims of emergency Presidential power, and the deadly hazard inherent in acknowledging such demands. Once more in *Youngstown,* he said:

> "The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies."

The Attorney General asks the Court to acknowledge that the President enjoys exactly these constitutionally forbidden powers. The Court cannot do less than recognize the nature and quality of the threat to constitutional government in the Attorney General's menacing demand.

The Court must strike down the claim to unilateral power, uphold the opinions and decisions of the courts below, proclaim again with Mr. Justice Jackson in *Youngstown*:

> "With all its defects, delays and inconveniences, men have discovered no technique for long pre-

serving free government except that the Executive be under the law, and that the law be made by Parliamentary deliberations.

"Such institutions may be destined to pass away. But is is the duty of the Court to be last, not first, to give them up."

II. CONGRESS DID NOT PURPORT TO GRANT THE PRESIDENT THE POWER HE CLAIMS

It is the Attorney General's contention that the President has the inherent constitutional power to tap wires without a warrant, whenever the Chief Executive unilaterally determines that an internal emergency exists which endangers the security of the nation.

Evidently mindful of the extraordinary and hazardous nature of the power thus attributed to the executive department, the Attorney General attempts to back up its original contention with the claim that Congress has delegated this unprecedented authority to the President. Both claims are meritless.

The power claimed for the President—if it can constitutionally exist at all in the government—must first be granted by the legislative department, since it is nowhere to be found in the Constitution itself, either explicitly or implicitly. If individual rights are to give way to national security considerations, an attempted exercise of legislative power, while not constitutionally conclusive, is essential.

The fact that power may exist in the Government to create an exemption to the Fourth Amendment

does not vest it in the President, and the alleged need for new legislation does not serve to enact a law giving the President this power, nor does it repeal or amend existing laws. In the present case the Attorney General has not pointed to any language in the Constitution, in the statutory law, or in the case law of the United States which would grant authority to the President, the Attorney General, or any federal law enforcement agency to exempt themselves from the restrictions of the Fourth Amendment.

Rather than investing the Executive with the power to circumvent the Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. sections 2510 et seq. (Supp. V, 1969), as a whole embodies an explicit recognition by Congress that the Fourth Amendment requires prior judicial approval of proposed searches and seizures of oral communication by electronic eavesdropping. Section 2511(3), which the Attorney General points to as support for his position, reads as follows:

> "(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such

measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." (18 U.S.C. § 2511(3) [Supp. V, 1969].)

The language utilized by Congress is expressly not the language used to confer a grant of power. As Judge Edwards pointed out in the court below, that language makes it clear that Congress has maintained a completely neutral position in the present controversy (444 F.2d 651, 664).

The legislative history of Section 2511(3) also supports the conclusion that Congress did not attempt to define the "constitutional power of the President," but intended only to leave that power exactly as it had been prior to the 1968 legislation. The discussion among Senators McClellan, Holland and Hart concerning the purpose of Section 2511(3), as summed up by Senator Hart, is conclusive:

"Mr. Hart: A few days ago I wondered whether we thought that we nonetheless could do something about the Constitution. However, we are agreed that this language [of sec. 2511(3)] should not be regarded as intending to grant any au-

thority, including authority to put a bug on, that the President does not have now.

"In addition, Mr. President, as I think our exchange makes clear, nothing in section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague, especially in domestic security threats, as opposed to threats from foreign powers. As I recall, in the recent Katz case, some of the Justices of the Supreme Court doubted that the President has any power at all under the Constitution to engage in tapping and bugging in national security cases without a court order. Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by Title III. As a result of this exchange, I am now sure no President thinks that just because some political movement in this country is giving him fits, he could read this as an agreement from us that, by his own motion, he could put a tap on." (114 Cong. Rec. 14751 [1968].)

This case regrettably discloses that Senator Hart was equipped with a badly clouded crystal ball.

III. THE PRESIDENT HAS NO INHERENT OR IMPLIED POWERS UNDER THE CONSTITUTION TO TAP WIRES

A. The Foreign Affairs Powers of the Presidency Do Not Extend to the Use Of Warrantless Electronic Eavesdropping In Domestic Matters.

The theory of inherent presidential power in the conduct of foreign affairs defined in *United States v. Curtiss-Wright*, 299 U.S. 304, 57 S.Ct. 216 (1936), finds no echo in the context of internal matters. At issue there was a criminal statute making it unlawful to ship munitions to South American countries engaged in the Chaco conflict if the President determined that such embargo would promote termination of the conflict. In disposing of the contention that the statute was unconstitutional as an invalid delegation of legislative power to the President, the Court declared that the ground of attack was irrelevant in the field of foreign affairs where the federal government's authority to act was an inherent concomitant of nationality and not derived by delegation from the Constitution, and where the President by virtue of his office enjoyed a plenary and exclusive power "as the sole organ of the federal government . . . a power which does not require as a basis for its exercise an act of Congress. . . ."

Even if the President may be said to have this plenary and exclusive power to act in the realm of foreign affairs,[4] the Court was clear that such power did not extend to the Chief Executive's domestic powers:

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[4] A point not necessary to concede, hence not conceded, by amici.

> "The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." (299 U.S. 315-316.)

The basis of this distinction is evident and well-founded. Limiting the President's power to the enumerated provisions of the Constitution was fundamental to the belief of the founding fathers that the grant of sovereign power should be distributed among three departments of government. Their purpose was to create a system of checks and balances on the awesome power that the people of the various states had delegated to the federal government. As Mr. Justice Brandeis noted in his dissent in *Myers v. United States, supra*:

> "The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of governmental powers among these departments, to save the people from autocracy."

There would be no meaning to the constitutional doctrine of separation of powers, and to the Constitution itself, if the President, under color of his power to conduct foreign affairs, could assume powers reserved to the other two branches.

B. The President's Position as Commander In Chief and Chief Executive Does Not Afford A Basis For Circumventing the Fourth Amendment.

It is next contended by the Attorney General that the President's roles as Commander in Chief and Chief Executive confer on him some nebulous, additional authority, which he is free to use outside the Constitution because of an impending internal security crisis.[5] This notion of presidential power has been squarely rejected by this Court in *Youngstown, supra.* There the Court was confronted with the question whether President Truman's seizure of the steel mills to prevent a "national crisis" could be defended as within the President's inherent power as Chief Executive and Commander in Chief. The Court overwhelmingly concluded that no such power could be found.

Mr. Justice Jackson asserted in *Youngstown* that while the claim of inherent and unrestricted presidential powers has long been a persuasive dialectical weapon in political controversy, prudence has counseled that reliance on such nebulous claims must stop short of provoking a judicial test (343 U.S. at 646-647). The Constitution has made no provision for exercise of extraordinary authority by the Executive in times of internal crisis. Emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who

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[5]The Attorney General's position requires the inference that the Chief Executive has faced this crisis continually since Franklin Roosevelt's Confidential Memorandum of May 21, 1940 (444 F.2d at 669).

exercises them. This is the safeguard that would be nullified by adoption of the "inherent powers" formula.

The specific grants of authority to the President in Article II of the Constitution will not support the Attorney General's claim that the President has power to ignore the Fourth Amendment. The President's admittedly broad powers as Commander in Chief have not been sufficient to order civilians charged with wartime violations of the laws of the United States to submit to the streamlined processes of a military tribunal rather than the orderly processes of the judicial system. *Ex Parte Mulligan,* 71 U.S. (4 Wall.) 2 (1866); *Duncan v. Kahanamoku,* 327 U.S. 304 at 319-324 (1946). By the same reasoning, issuance of an executive warrant which would bypass constitutional judicial process cannot be justified on the basis of the President's war powers.

The Constitution, in making the President the Commander in Chief of the Army and Navy, did not constitute him also Commander in Chief of the country and its inhabitants. The military powers of the President were not intended to supersede representative government in the conduct of internal affairs. The provision of the Constitution authorizing Congress to summon the militia underscores the Constitution's policy that Congress, not the Executive alone, may control utilization of the war power as an instrument of domestic policy.

C. The Claimed Power May Not Be Found In Constitutional Provisions Giving the President Executive Power.

Nor may an executive warrant be sustained because of the several constitutional provisions in Article II granting power to the President. The vesting of executive power in the President under section 1 of Article II and that provision of section 3 of Article II directing the President to take care that the laws be faithfully executed do not constitute a grant of the sweeping executive power claimed here.

In *In re Neagle,* 135 U.S. 1 (1890), the Court held that a United States Marshall who had been assigned by the Attorney General to protect a Supreme Court Justice while on tour of his circuit in California and who killed a man in the course of an attack on the Justice, had performed this act in pursuance of a law of the United States, within the meaning of the federal habeas corpus statute. Neagle was ordered freed from the custody of state officers who had held him on a murder charge.

No federal legislation expressly authorized marshals of the United States to accompany the judges of the Supreme Court through their circuits and act as bodyguards for them. Nevertheless, Neagle was held to be acting in pursuance of a duty under laws of the United States. The Court spoke at length of the power of the President, in discharge of his obligation to take care that the laws be faithfully executed, but equally relied on a provision of the Revised Statutes dealing with the powers of federal marshals and their deputies in executing the laws of the United States.

Myers v. United States, supra, upheld the prerogative of the President in removing, contrary to statute, an officer appointed by the President and serving in the executive department. Speaking for the majority, Chief Justice Taft declared that the opening language of section 1 vesting the executive power in the President was a grant of authority to take appropriate steps with respect to discharge of executive functions. Here was a recognition that section 1 was something more than just a designation of the title of chief executive officer and that it was in itself and undefined grant of executive power.

But the Chief Justice went on to develop the argument that the power of appointment implied a power of removal so that the case could have rested adequately on the theory that the specific grant of certain powers to the President implied incidental powers necessary to their effective execution, just as Congress has the power to enact legislation necessary and proper to effectuate its expressly granted powers.

These decisions establish that the President's constitutional authority is limited to specific grants of power stated in Article II and powers fairly implied therefrom. Despite the language used and the recognition that section 1 of Article II is itself a grant of executive power of undefined dimensions, the decisions viewed on their facts and with respect to the character of the problem presented lend no credence to the idea that the President has the general power to take all steps that he deems appropriate to the welfare and safety of the United Staes. See *In re*

Debs, 158 U.S. 564 (1895); *United States v. Midwest Oil Company*, 236 U.S. 459 (1915). On this point, Mr. Justice Black spoke for the Court most forcibly in *Youngstown, supra*:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States. . . .' After granting many powers to the Congress, Article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (345 U.S. 579, at 587.)

CONCLUSION

The Constitution, by giving the power here claimed by the President to the Judicial Department, denies the power to the Executive Department.

Congress has not purported to vest any such power in the President.

There are no implied or inherent powers incident to the President's executive authority which permit

him to engage in warrantless wiretapping, at least in domestic matters.

The decisions of the courts below ought to be affirmed.

Dated, San Francisco, California,
December 15, 1971.

Respectfully submitted,

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